Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JAMES A. WATSON, PAMELA D. SEAY, ANTHONY A. WILLIAMS, DONALD L. PENNINGTON, BARRY EATON, CHRIS M. NECHODOM, LUTHER G. ROWLAND, III, CHARLES A. STREAT, KARVIN T. RODGERS, FRANK MORALES, DOUGLAS P. ACRES, CORNELL J. JEFFERSON, and CLIFTON E. CARNEY,

Petitioners,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Merit Systems Protection Board follow the statutory test for LEO status which hinges on a determination of the primary duties of the employee's position as set forth in 5 U.S.C. § 8401(17)(a)?

2. Did the Merit Systems Protection Board erroneously use as a critical and controlling factor for the board in determining LEO status the "creation" of the position and not its "existence" as the regulation provides?

3. Is the reason for the creation of the position twenty or more years earlier the same as the reason for its existence today?

4. Did the Merit Systems Protection Board erroneously reformulate the definition of primary duties by taking only one element of OPM's regulatory test and then misinterpreting the single part by substituting the erroneous concept of "creation" in the place of the word "existence"?

James A. Watson, Pamela D. Seay, Anthony A. Williams, Donald L. Pennington, Barry Eaton, Chris M. Nechodom, Luther G. Rowland, III, Charles A. Streat, Karvin T. Rodgers, Frank Morales, Douglas P. Acres, Cornell J. Jefferson and Clifton E. Carney hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

In *Watson, et al. v. Department of the Navy*, the Court of appeals's decision affirming the Merit Systems Protection Board was entered on August 17, 2001 and is reported at Fed. Cir. No. 00-3387 (08/17/01). The court of appeals's decision is appended hereto as Appendix A.

These cases arose in the Federal Circuit on petition for review of a final decision of the Merit Systems Protection Board. The Board's decision in *Watson* is reported at 86 MSPR 718 (2000) (Appendix B).

STATEMENT OF JURISDICTION

This case arises on petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit. The court below affirmed the Merit Systems Protection Board's decisions sustaining the Department of the Navy's determinations that petitioners were not law enforcement officers and therefore were not entitled to enhanced retirement benefits under 5 U.S.C. §§ 8336(c) and 8412(d). This petition is filed within the time allowed by law. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 8331(20) provides:

> "[L]aw enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

Title 5, United States Code, Section 8401(17) provides:

> [T]he term "law enforcement officer" means —
>
> (A) an employee, the duties of whose position —
>
> (i) are primarily —
>
> (I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States; or
>
> (II) the protection of officials of the United States against threats to personal safety; and
>
> (ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency.

STATEMENT OF THE FACTS

The petitioners are police officers at the Norfolk Naval Base in Norfolk, Virginia. The duties they perform as police officers are primarily the investigation, apprehension and detention of criminals and criminal suspects. The police officers meet the statutory definition of law enforcement officers.

REASONS FOR GRANTING THE WRIT

In establishing the legal standard by which this case and all other LEO cases across the nation will be adjudicated, it is critical to insure the approach is the correct one. The decision of the United States Court of Appeals for the Federal Circuit affirmed the decision of the Merit Systems Protection Board which by all accounts was the incorrect legal test. As the majority determined, the Board's opinion "incorrectly states the law." Appendix A at 14a. As Senior Circuit Judge Friedman points out, the "critical and only controlling factor for the Board in determining LEO status was the reason for the 'creation' of the position and not its 'existence', as the regulation provides." *Id.* (Friedman dissenting in part, Appendix A at 25a). Judge Friedman's finding that the critical and controlling factor in the Board's opinion is well supported. In prior decisions, that did not rely on the Board's creation test, police officers were found to be entitled to LEO coverage. *Bremby v. Department of the Navy*, 81 MSPR 450 (1999); *Hamilton v. Department of the Navy*, 85 MSPR 409 (2000). It is also significant that the Administrative Judge who actually heard the case made numerous factual determinations, consistent with prior Board decisions, which lead him to conclude the police officers performed LEO work. Therefore, the only difference in this case and the Board's prior cases finding officers at the same location, performing the same duties, under the same position description were entitled to LEO was the new test applied by the Board.

A significant part of the Board's error, affirmed by the Court, is that it used an OPM classification standard as evidence of the reason for the creation of the position. The classification standard explains the broad range of duties which could potentially be worked by the police officer whereas the position description describes those duties actually worked. The broad OPM classification standard used in this case, GS-083, includes both LEO and non-LEO work and sheds no light on the reason why the position was originally created or even why it exists today. While the use of an OPM classification standard cannot be ruled out as having some potential to assist in determining entitlement to LEO coverage, the GS-083 standard is useless in this case where the standard includes both LEO and non-LEO work. The critical starting point here would be the position description which describes the actual duties being performed by the police officers which fall within the broader classification standard and which directly state where within the broad GS-083 classification these police officers' duties lie.

The ultimate test in determining LEO duties is a determination of the primary duties of the position. The Board did not apply the test properly. As Judge Friedman concluded:

> The portion of that definition here involved — duties that "constitute the basic reasons for the existence of the position" — is unambiguous. In applying the LEO statute, the Board's responsibility was to apply that definition to the facts of the case, not to reformulate the definition by substituting the concept of the reasons for "creation" of the opinion for the reasons for its "existence."

Watson, Friedman, dissenting in part, Appendix A at 25a.

In view of the Board's clear misstatement of the law affirmed by the majority of the United States Court of Appeals for the Federal Circuit the standard by which all other LEO cases will be reviewed is incorrect.

CONCLUSION

In *Watson* the United States Court of Appeals for the Federal Circuit affirmed the Board's redefined LEO test and put an unwarranted and improper emphasis on a misstatement of a portion of one part of the three-prong test. The Board's reformulation of the regulatory definition to include as part of the test the reason the position was created is clear error.

This case affects hundreds of law enforcement officers across the United States and requires the proper standard be established and applied. The "position oriented approach" which relies on the reason for the creation of the position and an irrelevant classification standard is not the correct approach.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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